IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
5:13-cv-00607-BO

CALLA WRIGHT, *et al.*,	)
	)
	)
Plaintiffs,	)
	)
vs.	)
	)
THE STATE OF NORTH CAROLINA, and THE WAKE COUNTY BOARD OF ELECTIONS	)
	)
Defendants.	)
	)

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

Plaintiffs respectfully submit the following memorandum of law in opposition to Defendants' Motions to Dismiss for failure to state a claim and lack of jurisdiction over the State of North Carolina. Plaintiffs further respectfully request that the Court exercise its discretion to permit them an opportunity to be heard at an oral argument on Defendants' motions. Local Civil Rule 7.1(i).

I. STATEMENT OF THE CASE

Plaintiffs commenced this action on August 22, 2013 on behalf of individual plaintiffs and several associations of voters seeking to preserve their constitutional rights pursuant to 42 U.S.C. § 1983. Plaintiffs seek to enjoin implementation of S.L. 2013-110, which mandates a new redistricting plan for the Wake County School Board, passed and ratified June 13, 2013, because

the new districting scheme violates the equal protection guarantees of the United States and North Carolina Constitutions.

On November 4, 2014, Defendants filed their Joint Answer (Docket Entry, hereinafter "D.E." 30) And two Motions to Dismiss (D.E. 27; D.E. 29), accompanied by a Joint Memorandum in support of their motions (D.E. 28). On November 19, 2013, Plaintiff filed a Motion for Leave to Amend Complaint to add three defendants in their official capacities and to remove the State of North Carolina as a Defendant, which is not opposed by Defendants, along with a supporting memorandum of law. (D.E. 33, 34). Plaintiffs now file this memorandum in opposition to Defendants' motions to dismiss.

II. STATEMENT OF FACTS

In 2011 the Wake County School Board redrew its nine single-member districts to accommodate the tremendous population growth in the county, adopting a new redistricting plan with an overall population deviation of 1.66% and no single district with a deviation above 1%. (D.E. 1, ¶¶ 31, 35). In 2013, the North Carolina General Assembly re-redistricted the Board, changing its structure and enacting a redistricting plan with an overall deviation of nearly 10% for the lettered districts, and 7.11% for the numbered districts. (D.E. 1, ¶53). The Plaintiffs' claim that due to the larger than necessary population deviations, their voting strength is diminished as compared to other voters in the County for reasons that are arbitrary and capricious requires an understanding of events leading up to the General Assembly's decision to enact S. L. 2013-110.

In 2009 candidates favoring conservative policies won control of the Board. (D.E. 1 ¶ 30). The Board then enacted a highly controversial "neighborhood schools" policy that would

result in more racially and economically homogenous schools. (D.E. 1 ¶32). In 2011, following the release of the Census, the Board, as authorized by state law, redrew its election districts to account for the massive population growth of 43.51% within the last decade. (D.E. 1 ¶ 28). In the early months of 2011, the Board engaged a law firm to draw alternative redistricting plans and advise the Board. At the time of the 2011 redistricting, the conservative majority controlled the Board. (D.E. ¶ 34). Thus, the 2011 redistricting process came under intense public scrutiny. The Board paid a private law firm $35,000 to redraw the new districts. (D.E. 1 ¶35). The Board had a public hearing on May 10, 2011 and, on May 17, 2011, by a vote of five to three; the Board adopted a new redistricting plan. (D. E. 1 ¶1).

With the new districts in place in the fall of 2011, progressive candidates defeated conservative incumbents, and the Board became Democratic-leaning after Wake County voters rallied against the "neighborhood schools" policy adopted by the Board in 2009. (D.E. 1 ¶ 40).

Seven months after the election, the North Carolina General Assembly, over the objection of a majority of the Board, passed a local bill making numerous changes in the method of election, including changing from nine single-member districts to seven single-member districts with two "super-districts". (D.E. 1 ¶ 1) The two super-districts divide the county like a donut, with an inner, urban super-district and an outer, rural super-district, to be implemented in 2016. (D.E. 1 ¶ 47) The bill also prohibits the Board from making any further changes in its method of election until 2021 and then only to correct population imbalances. (D.E. 1 ¶ 46)

The second redistricting, less than two years after the 2011 maps were enacted, was designed to create a conservative majority on the Board and oust existing progressive representatives, at the expense of weighting all Wake County voters' votes equally. (D.E. 1 ¶

46). In order to achieve this goal, the General Assembly greatly increased the deviation between districts that had been rebalanced only two years ago, without complying with legitimate redistricting principals. (D.E. 1 ¶53). Maximum deviations are computed according to an algorithm by calculating by how much each district's actual population deviates from the ideal population. *See, Dean v. Leake*, 550 F. Supp. 2d 594, 598 (E.D.N.C. 2008) (explaining the calculation of population deviations). The 2011 plan had an overall deviation of 1.66%, with five of the nine districts having a deviation of under 0.5%. (D.E. 1 ¶ 37). The chart below shows the deviations in each of the districts in the 2011 districts. (D.E. 1 ¶ 54).

District	Deviation	% Deviation
1	-434	-0.43%
2	936	0.93%
3	770	0.77%
4	16	0.02%
5	-691	-0.69%
6	199	0.20%
7	-733	-0.73%
8	96	0.10%
9	-156	-0.16%

S.L. 2013-110 contains far greater population deviations than the previous plan. The two super-districts have an overall deviation of 9.8% and the seven single-member district plan has an overall deviation of 7.11%. (D.E. 1 ¶ 53) This is a marked increase from the 2011 plan'

overall deviation of 1.6%. The table below shows the population deviation in each district. (D.E. 1 ¶ 54).

District	Deviation	% Deviation
1	3550	2.76%
2	-5398	-4.19%
3	4678	3.63%
4	1591	1.24%
5	239	0.19%
6	-174	-0.14%
7	-4484	-3.48%
A	22088	4.90%
B	-22088	-4.90%

As shown from the chart, the urban "superdistrict," District A, is substantially overpopulated, and the rural "superdistrict," District B, is substantially underpopulated. There are approximately 45,000 more Wake County voters in District A than there are in District B. (D.E. 1 ¶ 56). The overall deviation between the two super districts is 9.8%. Id. Further, District 2 is substantially underpopulated by 4.19% (D.E. 1 ¶ 61). District 3, drawn without an incumbent, contains more urban areas of Wake and partially mimics the shape of Democratic-leaning state Senate District 14. District 3 is overpopulated by 3. 63%. (D.E. 1 ¶ 61). Meanwhile, District 7, drawn without an incumbent in the more rural area of Wake County, is underpopulated by 3.48%. (D.E. 1 ¶ 61).

These population deviations arise in districts that are geographically less compact than the 2011 districts. (D.E. 1 ¶ 66). Further, the new plans divide more traditional political units, as the lettered and numbered districts split 21 unique precincts in the county (11 of which are split in both the lettered and the numbered plans), while the 2011 plans split only 11 precincts. (D.E. 1 ¶ 67). Additionally, three registered-Democrat incumbents are redistricted into two Republican-leaning districts with Republican-registered incumbents. (D.E. 1 ¶¶ 52, 62) Two districts, District 3 and District 7, have been drawn without an incumbent. (D.E. 1 ¶52).

III. ARGUMENT

Plaintiffs brought this suit to protect the rights of Wake County voters to cast a vote that counts equally, no matter which district they live in. In their motions to dismiss, Defendants have set up a straw man. They mischaracterize Plaintiffs' complaint as asserting a partisan gerrymandering claim and then argue that partisan gerrymandering is non-justiciable. The Complaint in this action clearly states a one-person, one-vote claim that is justiciable.

Second, Defendants posit that a rule of presumptive constitutionality is, in fact, a rule of absolute constitutionality; and assert that there can be no challenge on one-person, one-vote grounds to a redistricting plan that is under 10% in overall deviation. That is not the law. The presumption of constitutionality is rebuttable, and, as demonstrated below, numerous courts have invalidated redistricting plans on one-person, one-vote grounds where the plans contain unnecessary deviations below 10% that are shown to be arbitrary and capricious.

These mischaracterizations cannot obscure the real constitutional equal protection claims at issue here, where under the new plan, some Wake County voters will cast votes that weigh more than those of other county residents. Indeed, Defendants failed to reference the leading

case of partisan gamesmanship and population deviations, *Cox v. Larios*, 542 U.S. 947 (2004), where the Supreme Court affirmed a lower ruling that partisan gamesmanship that favors certain geographic regions and targets incumbents cannot justify population deviations below 10%. Deviations of less than 10% have a *rebuttable* assumption of constitutionality. The same constitutional violations found in *Larios* are alleged here with specificity in the claims now before the court. Plaintiffs' claims, based on facts viewed in the light most favorable to the Plaintiffs, state a cause of action and survive the Defendants' motion to dismiss.

In addition, Plaintiffs, in their proposed Amended Complaint, (see D.E. 33) have named proper Defendants, Governor Patrick McCrory, House Speaker Thomas Tillis and President Pro Tem Phillip Berger, in place of the State of North Carolina. Under the *Ex Parte Young* doctrine, these state officials are proper stand-ins for the State of North Carolina as Plaintiffs seek injunctive relief under 42 U.S.C. §1983. *Ex Parte Young*, 209 U.S. 123, 159-160 (1908). Therefore Defendant State of North Carolina's motion to dismiss on sovereign immunity grounds does not result in a dismissal of Plaintiffs' claims.

A. A MOTION TO DISMISS MUST BE DENIED IF PLAINTIFFS STATE A PLAUSIBLE CLAIM

A complaint must contain factual allegations sufficient to state a plausible claim for relief to survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12 (b) (6). *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79, (2009). In reviewing a motion to dismiss, the Court must: 1) assume all of the plaintiffs' factual allegations are true; 2) resolve all doubts and inferences in favor of the plaintiff; and 3) view the allegations in a light most favorable to the plaintiff. *Edwards v. City of Goldsboro*, 178 F.3d 231, 243-44 (4th Cir. 1999). A claim must only be dismissed if it does not allege "'enough facts to state a claim to relief that is plausible on its

face.'" *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008). As the *Iqbal* Court noted "(w)hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679.

Here, the Complaint makes specific factual allegations about the size of the population deviations, the lack of geographic compactness of the districts, the geographic areas affected, and the incumbents targeted , all of which support the allegation that there was no legitimate state interest justifying the size of the population deviations in S.L. 2013-110 that will deprive thousands of voters in Wake County of an equal vote if they are implemented.

B. S.L. 2013-110 VIOLATES FEDERAL AND STATE ONE-PERSON, ONE-VOTE PRINCIPLES BY CREATING ARBITRARY AND DISCRIMINATORY POPULATION DEVIATIONS.

Plaintiffs allege that S.L. 2013-110 violates federal and state "one-person, one-vote" principles by creating larger than necessary population deviations without a legitimate state interest. (D.E. 1 ¶ 68). The General Assembly's drafting of new districts in S.L. 2013-110 to favor certain rural over urban residents, target incumbents, disregard traditional redistricting principles and override the express intent of a majority of Wake County voters parallels the holding of *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), which found that the Georgia legislative plans reapportionment plan with less than 10% population deviations, were arbitrary and discriminatory in violation of the Equal Protection Clause, a decision that was summarily affirmed by the United States Supreme Court in *Cox v. Larios*, 542 U.S. 947 (2004).

It is well-established that summary affirmances by the Supreme Court, which involve the same issues, are binding upon lower courts. *See Hicks v. Miranda*, 422 U.S. 332, 344-345 (1975) ("[T]he lower courts are bound by summary decisions by this Court until such time as

the Court informs (them) that they are not."); *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) ("(Summary affirmances) prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions."); *Ledesma v. Block*, 825 F.2d 1046, 1050 (6th Cir. Mich. 1987) ("While the case was only summarily affirmed by the Supreme Court on a direct appeal, it is established that such summary decisions are binding on the lower courts.)

The holding in *Larios* was based upon the axiom that the right to vote is a fundamental right and may not be diluted. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). To protect against a vote's dilution, the overriding objective in any reapportionment of election districts remains "equal representation for equal numbers of people." *Id.* at 559-560. Any deviation from equal population between districts can only be justified by "legitimate state interests such as making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent(s)." *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). Adherence to such legitimate redistricting factors shows that the deviations are "free from any taint of arbitrariness or discrimination." *Roman v. Sincock*, 377 U.S. 695, 710 (1964). As explained in *Larios*, the unequal weighting of geographic areas, the systematic targeting of incumbents and the override of the voters' favored results all show the deep taint of arbitrariness and discrimination in the General Assembly's drafting of S.L. 2013-110.

1. <u>The "Prima Facie" Constitutionality of "De Minimis" Population Deviations is a Rebuttable Presumption.</u>

Plaintiffs' claims are in no way barred simply because the population deviations in S.L. 2013-110 are below 10%. The Supreme Court held that "districts may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment." *Gaffney v.*

Cummings, 412 U.S. 735, 751 (1973) (the Court found that the deviations at issue failed to make out a prima facie case of discrimination, but addressed the plaintiff's claim that the apportionment plan was invidiously discriminatory because it was based on a "political fairness" principle).

The Fourth Circuit, even prior to *Cox v. Larios*, articulated a clear standard for reviewing the constitutionality of "*de minimis*" population deviations. In *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996), the court observed that the 10% threshold "does not completely insulate a state's districting plan from attack of any type" but, rather, "serves as the determining point for allocating the burden of proof in a one person, one vote case." *Id.* at 1220. Plaintiffs may rebut the assumption of constitutionality by showing evidence that the apportionment process had a "taint of arbitrariness or discrimination." *Id.* In *Daly*, the court evaluated claims that the Mecklenburg Board of Commissioners had a maximum deviation of 8.33% in terms of total population, a deviation under 10%, and remanded the case to the district court to receive any additional evidence that the districting plan at issue was the result of bad faith, arbitrariness, or invidious discrimination. *Id.* at 1228.

Contrary to Defendants' assertions, Plaintiffs have clearly stated a viable claim under the framework outlined in *Daly*, 93 F.3d at 1228. Notably, the Fourth Circuit considered the claims in *Daly* after the lower court had granted relief to Plaintiffs on summary judgment, finding that the General Assembly "offered no legitimate justification for the large variances in voting-age population among the districts." *Id.*, at 1215. The Plaintiffs here allege that the population deviations in S.L. 2013-110 violate equal protection guarantees of the federal and state constitutions because they are not created out of adherence to traditional legitimate state interests and redistricting factors. (D.E. 1 ¶ 66). Rather, the Wake plan has deviations of up to

9.8%, (D.E. 1 ¶ 66), systematically created to overpopulate urban areas in Wake and unseat Democratic incumbents in order to advance Republican interests, which is an impermissibly arbitrary and discriminatory rationale for population deviations. *Larios v. Cox,* 305 F. Supp. 2d at 1339 (order denying stay pending appeal) ("(T)his policy was both arbitrary in its inconsistency of application and discriminatory in its goal of protecting only one political party. It in no way resembles anything the Supreme Court has ever found to be a constitutional justification for population deviations.") In *Larios,* the court analyzed the Georgia legislative plans total population deviation of 9.98%, only slightly above the total deviation of 9.8% in the Wake plan. 300 F. Supp. 2d 1320 at 1322.

The effect of the North Carolina General Assembly's re-redistricting is plain. Under the 2011 plans, five of the nine districts leaned Democratic. (D.E. 1 ¶ 61). In S.L. 2013-110, five out of the nine districts lean Republican. (D.E. 1 ¶ 62). The "urban" superdistrict is overpopulated, and the "rural" superdistrict is underpopulated resulting in an overall deviation between the urban and rural districts of 9.8%. (D.E. 1 ¶ 56). By underweighting the votes of urban voters and overweighting the votes of rural voters, urban voters who may have different education priorities, are systematically devalued in favor of more rural voters' interests. Additionally, three Democratic incumbents are paired against two Republican incumbents in Republican-leaning districts, which shows that the incumbents are being targeted based on partisan affiliation. (D.E. 1 ¶ 64).

Other courts have found that population deviations under 10% may form the basis for a viable equal protection claim. In *Hulme v. Madison County,* 188 F. Supp. 2d 1041, 1051 (S.D. Ill. 2001), a district court found that a county board, with a population deviation of 9.3% violated the equal protection clause. The court found the deviations to be arbitrary and discriminatory

because the main cause of the deviations was to the intent to "create districts that would not simply disadvantage Republican members of the Board, but "cannibalize" their districts to the greatest extent possible." *Id.*

Recently, an Arizona district court denied defendants' motion to dismiss claims that the state legislative districts violated the equal protection clause with maximum population deviation of 8.8%. *Harris v. Ariz. Indep. Redistricting Comm'n,* 2012 U.S. Dist. LEXIS 164882, 6 (D. Ariz. Nov. 16, 2012) (copy attached). Plaintiffs there alleged that the redistricting commission had "systematically overpopulated Republican districts and under-populated Democratic districts for the sole purpose of maximizing Democratic Party strength in the state legislature." *Id.* Finding that is "unclear whether pure partisanship is an arbitrary or discriminatory purpose," the court allowed the claims to proceed to trial. *Id.* at 12-13.

In reviewing a motion to dismiss, the Court must assume all of the plaintiffs' factual allegations are true. Here, Plaintiffs have alleged facts sufficient to that show the plans were tainted by arbitrariness and discrimination and to rebut the presumption that the plans are constitutional. Thus, as Plaintiffs' equal protection claims are plausible on their face and supported by specific factual allegations, Defendants' motion to dismiss for failure to state a claim must be denied. *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008).

2. The State Cannot Claim a Safe Harbor for Redistricting Population Deviations

The Supreme Court's decision in *Cox v. Larios* in 2006 established that partisan gamesmanship at the expense of traditional redistricting principles cannot justify population deviations at any level. *Cox v. Larios,* 542 U.S. 947 (2004). To sustain a challenge under

Larios, plaintiffs must only show that the population deviations were created systematically with built-in bias tending to favor particular political interests or geographic areas. *Larios v. Cox*, 300 F. Supp. 2d 1320, 1346 (N.D. Ga. 2004). Such arbitrary and discriminatory bias is unconstitutional. *Id.*

All population deviations within any local or state reapportionment plans must have nonpartisan justifications, regardless of the size of the deviation. *See, Roman v. Sincock*, 377 U.S. 695, 710 (1964) ("the proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.")

Contrary to the State's claim, there is no safe harbor for population deviations. In *Cox v. Larios*, the Supreme Court affirmed the position that a *de minimis* standard of deviation does not insulate the State from liability when the deviation is created primarily favor one political party. *See, Larios v. Cox*, 300 F. Supp. 2d at 1340-1341. The *Larios* lower court explicitly rejected the defendants' assumptions of a safe harbor, finding:

> We agree that state legislative plans with population deviations of less than 10% may be challenged based on alleged violation of the one person, one vote principle. Indeed, the very fact that the Supreme Court has described the ten percent rule in terms of "prima facie constitutional validity" unmistakably indicates that 10% is not a safe harbor. Had the Court intended to foreclose all one person, one vote challenges to plans with population deviations not rising to the 10% level, the Court would undoubtedly have said as much, rather than expressing that such plans are merely "prima facie" -- in other words, rebuttably -- constitutional.

Id.

In *Larios*, the trial court held that the Georgia state legislative reapportionment plans, drawn with an overall deviation of 9.98%, violated the equal protection clause. The court found that Georgia drew districts within "what they perceived to be a 10% safe harbor" to favor Democrats. *Id.* at 1328. The court also found that the shape of the districts suggested an intent to favor incumbent Democrats and prejudice Republican incumbents. *Id.* at 1329. After examining the districts, the lower court found that Georgia did not consider compactness, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent in drawing the districts. *Id.* at 1331. The court concluded that:

> The population deviations in the Georgia House and Senate Plans are not the result of an effort to further any legitimate, consistently applied state policy. Rather, we have found that the deviations were systematically and intentionally created (1) to allow rural southern Georgia and inner-city Atlanta to maintain their legislative influence even as their rate of population growth lags behind that of the rest of the state; and (2) to protect Democratic incumbents. Neither of these explanations withstands Equal Protection scrutiny. First, forty years of Supreme Court jurisprudence have established that the creation of deviations for the purpose of allowing the people of certain geographic regions of a state to hold legislative power to a degree disproportionate to their population is plainly unconstitutional.

Id. at 1338.

The facts in *Larios* are nearly identical to those now before the Court in this case. First, Georgia legislators, hoping to increase electoral success for Democrats, intentionally and systematically underpopulated districts in rural south Georgia and inner-city Atlanta, which leaned Democratic, and correspondingly overpopulated the districts in suburban areas surrounding Atlanta, which leaned Republican. *Id.* at 1322. The legislative plans also underpopulated the districts held by incumbent Democrats. *Id.* at 1322. Under this "unambiguous attempt to hold onto as much of that political power as they could," Democratic voters cast votes

that weighed more than Republican voters, chiefly because of the area in the state in which they lived. *Id.* at 1328.

In addition to the favoring of inner-city and rural areas over suburban areas, Georgia also targeted sitting Republicans by overpopulating Republican districts, pairing Republican incumbents and protecting Democratic Republicans. *Id.* at 1329. The cumulative effect of these changes guaranteed more seats for the Democrats. *Id.* at 1330.

After noting the effects of regional interests and incumbent targeting, the *Larios* Court then analyzed whether the plan complied with traditional redistricting criteria, such as "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." *Id.* at 1331. The court, after examining the districts visually and using mathematical measures, found them to be relatively noncompact. *Id.* The court also found that the plan did not attempt to keep counties whole or to preserve the core of existing districts. *Id.* at 1333-1334.

In light of these various factors, the court found that population deviations were not created in response to a compelling state interest, but rather, "(t)he twin goals of regional favoritism and protection of Democratic incumbents led to the underpopulation and overpopulation of certain districts." *Id.* at 1334. The court held that these partisan-driven population deviations violated the Equal Protection Clause of the United States Constitution. *Id.*

Here, as in *Larios*, Defendants have drawn districts designed to further one party's political advantage by purposeful deviations between urban and rural areas, and pairings of Democratic incumbents. (D.E.1, ¶ 66). In the case of the Wake County School Board, Plaintiffs allege that the new districts, drawn with significantly greater population deviations than previous

districts, have deviations that are not created by compliance with legitimate redistricting principles. In response, Defendants echo the assertions of Georgia legislators who believed "there was a 'safe harbor' of +/- 5% in the reapportionment of state legislative districts and, therefore, that population deviations not rising to that level did not have to be supported by any legitimate state interest." *Id.* at 1325. As shown in *Larios*, this defense must fail.

As in *Larios*, the North Carolina General Assembly achieved partisan goals through the twin methods of overpopulating Democratic districts and targeting Democratic incumbents. The General Assembly's neglect of traditional redistricting principles is apparent. The lettered and numbered districts in S.L. 2013-110 are visually and mathematically less compact than the districts in the 2011 plan. (D.E. 1 ¶ 66). Further, the plan disregards precincts, as the lettered and number districts split 21 unique precincts in the county (11 of which are split in both the lettered and the numbered plans), while the 2011 plans split only 11 precincts. (D.E.1 ¶ 69).

C. POPULATION DEVIATIONS RECOGNIZED AS DE MINIMIS UNDER THE NORTH CAROLINA CONSTITUTION DO NOT BAR PLAINTIFFS' STATE EQUAL PROTECTION CLAIMS

The right to vote on equal terms is a fundamental right under Article I, §19 of the Constitution of North Carolina. *Northampton Cty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 746, 392 S.E.2d 352, 355 (1990).[1] As such, any classification that denies voters the right to vote must be justified by a compelling state interest subject to strict scrutiny. *Id.*, 326 N.C. at 747, 392 S.E.2d at 355. Plaintiffs allege here that citizens who vote in overpopulated districts have a vote which is weighed less than those who vote in underpopulated districts, depriving them of the right to vote on equal terms. Geographic favoritism and targeting of incumbents do not rise to the level of a compelling state interest.

[1] Plaintiffs seek to have this Court invoke supplemental jurisdiction over this claim pursuant to 28 U.S.C. 1367.

The deviations outlined by *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) do not excuse the Defendants from complying with traditional redistricting principles and the constitutional guarantees of one person-one vote. The court in *Stephenson* said that districts must be drawn at or within a deviation of 5% as a means of fulfilling the "obligation to ensure that the WCP complies with federal law." *Id.*, 355 N.C. at 382, 562 S.E.2d at 396. As in federal law, *Stephenson* does not offer a safe harbor for population deviations. Rather, population deviations that weaken the vote of one citizen at the expense of another must be justified by compliance with state and federal redistricting principles. *Id.*, 355 N.C. at 382-384, 562 S.E. 2d at 396-397.

In *Stephenson*, the Court rejected the use of multimember districts and single member districts in the same plan based on equal protection principles. *Id.*, 355 N.C. at 380-381; 562 S.E. 2d at 395. Assigning voters to single or multimember districts "create(d) an impermissible distinction among similarly situated citizens based upon the population density of the area in which they reside" *id.*, that violated the constitutional right that "all (voters) enjoy substantially equal voting power." *Id.*, 355 N.C. at 379, 562 S.E. 2d at 395. S.L. 2013-110 creates an analogous equal protection violation by weighting the votes of citizens differently based on where they live. As explained *infra* in discussing the federal claim, absent compliance with a legitimate state interest, these populations are arbitrary and discriminatory violations of the state equal protection clause.

As North Carolina subjects any infringement on the right to vote on equal terms to strict scrutiny, Defendants must meet a higher standard under Article 1 §19 than under the federal equal protection clause for one person, one vote violations.

D. ONE-PERSON-ONE VOTE CLAIMS ARE SEPARATE AND DISTINCT FROM CLAIMS OF PARTISAN GERRYMANDERING

Defendants mischaracterize Plaintiffs' claims as allegations of "nonjusticiable" political gerrymandering. (D.E. 28, p. 6). While it is uncontested that these new districts increase Republican influence, Plaintiffs are not asserting a political gerrymandering claim and do not need to prove a political gerrymander. Rather, in the *Larios* framework, Plaintiffs succeed by showing only that population deviation adopted was not driven by a legitimate state interest and was thus arbitrary or discriminatory. *Larios v. Cox*, 300 F. Supp. 2d at 1338. *Daly*, 93 F.3d at 1228. The General Assembly's political gamesmanship is manifested in three, concrete, unconstitutional factors: geographic favoritism, targeting of incumbents and usurping Wake voters' demonstrated intent. Together, these three factors overrode legitimate redistricting principles to create arbitrary and discriminatory population deviations. The burden of proof to show arbitrary and discriminatory treatment of voters created by partisan gamesmanship remains separate from the burden of proof necessary to show a racial gerrymander. *Larios v. Cox*, 300 F. Supp. 2d at 1334.

As the Supreme Court has recognized when it affirmed *Larios*, population deviation claims can succeed separate and distinct from a claim of partisan gerrymandering. To prove a partisan gerrymander under *Davis v. Bandemer*, plaintiffs must show a denial of political influence such that "the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence as a whole." 478 U.S. 109, 132 (1986). In contrast, to prove a one-person, one-vote population, plaintiffs must show that the population deviations are arbitrary or discriminatory because they were not created by adherence to legitimate redistricting criteria. As the Supreme Court noted:

> Ultimately the showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely.

Karcher v. Daggett, 462 U.S. at 741.

Partisan gains are not a legitimate state interest sufficient to abridge citizens' right to an equal vote. *Larios v. Cox*, 300 F. Supp. 2d at 1346. In his concurrence in *Larios*, Justice Stevens noted that, while equal population standards are key to keeping partisan interests in check, the claim is separate from the political gerrymandering jurisprudence addressed in *Vieth v. Jubelirer*, 541 U.S. 267 (2004). He explained that:

> Challenging the District Court's judgment, appellant invites us to weaken the one-person, one-vote standard by creating a safe harbor for population deviations of less than 10 percent, within which districting decisions could be made for any reason whatsoever. The Court properly rejects that invitation. After our recent decision in *Vieth v. Jubelirer*, 541 U.S. 267, 158 L. Ed. 2d 546, 124 S. Ct. 1769 (2004), the equal-population principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its strength.

Cox v. Larios, 542 U.S. 947, 949-950 (2004) (Stevens, J. concurring). Thus, while the one person one vote principles safeguard against partisan gamesmanship, establishing an equal protection claim does not require Plaintiffs' to prove a political gerrymander.

E. PLAINTIFFS' ONE-PERSON, ONE VOTE CLAIMS ARE FULLY JUSTICIABLE AND APPROPRIATE FOR JUDICIAL REVIEW

Recognizing Plaintiffs' "one person, one vote" claim as distinct from a claim of political gerrymandering, Plaintiffs proceed under a clear framework to show that the Wake plan's divergences from a strict population standard are not "based on legitimate considerations incident to the effectuation of a rational state policy," *Reynolds*, 377 U.S. at 557, but rather, bear the "taint of arbitrariness or discrimination" and thus fail to survive strict scrutiny. *Roman v. Sincock*, 377 U.S. 695, 710 (1964). With a clear standard in place, the Court is well prepared to

weigh the merits of such a claim. Defendants' allegation that there are no judicially manageable standards for the claims asserted in this case is unfounded.

As noted in by the Supreme Court in *Reynolds*, the court has a duty to evaluate one-person, one vote claims:

> We are told that the matter of apportioning representation in a state legislature is a complex and many-faceted one. … Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us…. When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.

Id., 377 U.S. at 566.

The Fourth Circuit and numerous other courts have adjudicated one person one vote claims. *See, e.g., Daly v. Hunt*, 93 F.3d. 1212 (4th. Cir. 1996) (remanding to the district court to receive any additional evidence showing that the districting plan at issue was the result of bad faith, arbitrariness, or invidious discrimination); *Hulme v. Madison County*, 188 F. Supp. 2d 1041, 1047 (S.D. Ill. 2001) (finding population deviation of 9.3% in local board plans was arbitrary and discriminatory); *Harris v. Ariz. Indep. Redistricting Comm'n*, 2012 U.S. Dist. LEXIS 164882, 12-13 (D. Ariz. Nov. 16, 2012) (denying motion to dismiss on plaintiffs' claims that population deviation was created for partisan advantage) (copy attached). Plaintiffs, having alleged facts that show that the population deviations in S.L. 2013-110 cannot be justified by a legitimate state interest, but rather are arbitrary and discriminatory in favoring rural over urban areas, disregarding traditional redistricting principles, and pairing Democratic incumbents, have stated a claim that necessitates judicial review.

F. DEFENDANTS MCCRORY, TILLIS AND BERGER ARE NOT IMMUNE TO SUIT UNDER THESE CLAIMS

Plaintiffs named the State of North Carolina as a Defendant to reduce the complexity of the litigation and limit the number of defendants burdened by litigation, with the hope that the State would consent to federal jurisdiction. The State of North Carolina may waive immunity to suit in federal court by consent. *Lapides v. Board of Regents of the Univ. System of Georgia*, 535 U.S. 613, 619 (2002). However, as the State raises Eleventh Amendment immunity as a defense, Plaintiffs have moved for leave to file an Amended Complaint dropping the State of North Carolina as a Defendant and adding Governor McCrory, Speaker of the House Tillis and Senate President Pro Tem Berger. (D.E. 33). Sen. Berger and Rep. Tillis presided over the North Carolina Senate and North Carolina House, respectively, when S.L. 2013-110 was enacted on June 13, 2003. As chief executor of the laws of North Carolina, Gov. McCrory oversees the implementation of S.L. 2013-110. Plaintiffs seek to enjoin the Defendants from executing or enacting constitutional violations found in S.L. 2013-110 and in any subsequent legislation.

In lieu of the State, Governor McCrory, Speaker Tillis and President Pro Tem Berger are the proper defendants for this action. Courts have consistently permitted the suit against state actors as a way of enjoining the state from unconstitutional action. *Ex parte Young*, 209 U.S. 123, 159-160 (1908). Individuals may sue state officials in their official capacity to avoid Eleventh Amendment challenges under the legal fiction that state actors lose their shield of immunity when their actions are unconstitutional. *See, Davis v. North Carolina*, 180 F. Supp. 2d at 776, fn. 1 (allowing state officials as defendants and citing *Ex Parte Young*).

In *Daly v. Hunt*, the one-person, one vote challenge to the Mecklenburg County Board of Education and the Board of Commissioners, plaintiffs sued the Governor, the Lieutenant

Governor, the Speaker of the House and the Mecklenburg County Board of Elections. *Daly*, 93F.3d at 1212. *See also*, *Bandemer v. Davis*, 603 F. Supp. 1479 (S.D. Ind. 1984) (sued Election Board and Secretary of State, consolidated with case that sued Governor and legislators for equal protection violations in state redistricting plans); *Brown v. Thomson*, 462 U.S. 835 (1983) (sued Election Board, Governor, Secretary of State under 28 USCS § 1343 for one person, one vote claims); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 365 (S.D.N.Y. 2004) (One person one vote, racial gerrymander, and Section 2 claims brought against the Governor); *Kalson v. Paterson*, 542 F.3d 281 (2d Cir. 2008) (Plaintiff sued a governor and state election officials, asserting that the difference in voting-age population between congressional districts violated U.S. Const. art. I, § 2.); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (Plaintiffs sued Governor and Secretary of State under 1983 for one person, one vote violations in Congressional plans).

As Defendants are subject to suit under *Ex Parte Young*, their motion to dismiss based on Eleventh Amendment immunity must be denied. For the State to continue to argue that state officials cannot be sued is essentially to argue that Plaintiffs have no relief whatsoever and cannot enjoin the State from violating their constitutional rights under S.L. 2013-110. Such an argument must fail in order to preserve Plaintiffs' rights under the federal and state equal protection clauses. Further, as Defendants note that the Attorney General will move to intervene as of right if the Wake Board of Elections' motion to dismiss is denied, (D.E. 28, p. 17, fn. 6), is appears Defendants implicitly acknowledge that this litigation properly involves the State.

IV. CONCLUSION

The Complaint in this action properly asserts sufficient facts, that if proven, entitle the Plaintiffs to injunctive relief to prevent the implementation of a redistricting plan that, because of

arbitrary and capricious population deviations, would violate the one-person, one-vote principle of equal protection in the United States and North Carolina constitutions. The Amended Complaint properly names state officials who are subject to suit. Therefore, Plaintiffs ask the Court to deny Defendants' motions to dismiss for failure to state a claim and on grounds of sovereign immunity.

Respectfully submitted, this the 23rd day of November, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2013, I electronically filed the foregoing PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS and, I hereby further certify that pursuant to Local Civil Rule 5.1(b) counsel for all other parties are being served as registered users of CM/ECF as provided for in Local Civil Rule 5.1(e).

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This the 23rd day of November 2013.

/s/ Anita S. Earls

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Wesley W. Harris, et al., Plaintiffs, v. Arizona Independent Redistricting Commission, et al., Defendants.

No. CV-12-0894-PHX-ROS-NVW-RRC

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

2012 U.S. Dist. LEXIS 164882

November 16, 2012, Decided
November 16, 2012, Filed

COUNSEL: [*1] For Wesley W Harris, qualified elector of the State of Arizona, LaMont E Andrews, qualifed elector of the State of Arizona, Cynthia L Biggs, qualified elector of the State of Arizona, Lynne F Breyer, qualified elector of the State of Arizona, Ted Carpenter, qualified elector of the State of Arizona, Beth K Hallgren, qualified elector of the State of Arizona, James C Hallgren, qualified elector of the State of Arizona, Lina Hatch, qualified elector of the State of Arizona, Terry L Hill, qualified elector of the State of Arizona, Joyce M Hill, qualified elector of the State of Arizona, Sherese L Steffens, qualified elector of the State of Arizona, Plaintiffs: Ahron David Cohen, Michael T Liburdi, LEAD ATTORNEYS, Snell & Wilmer LLP - Phoenix, AZ, Phoenix, AZ; David J Cantelme, LEAD ATTORNEY, Cantelme & Brown PLC, Phoenix, AZ.

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For Arizona Independent Redistricting Commission, Colleen Mathis, member thereof, in her official capacity, Linda C McNulty, member [*2] thereof, in her official capacity, Jose M Herrera, member thereof, in his official capacity, Scott D Freeman, member thereof, in his official capacity, Richard Stertz, member thereof, in his official capacity, Defendants: Brunn Wall Roysden , III, Joseph Andrew Kanefield, LEAD ATTORNEYS, Ballard Spahr LLP, Phoenix, AZ; Jeffrey Bryan Molinar, Mary Ruth OGrady, LEAD ATTORNEYS, Osborn Maledon PA, Phoenix, AZ.

For Ken Bennett, Arizona Secretary of State, in his official capacity, Defendant: Michele Lee Forney, LEAD ATTORNEY, Office of the Attorney General, Phoenix, AZ.

For Helen Purcell, Maricopa County Recorder, Karen Osborne, Maricopa County Elections Director, Intervenor Defendants: M Colleen Connor, LEAD ATTORNEY, Maricopa County Attorneys Office, Phoenix, AZ.

For Citizens Clean Elections Commission, Lori Daniels, Jeffrey L Fairman, Louis Hoffman, Thomas Koester, Intervenor Defendants: Thomas Matthew Collins, LEAD ATTORNEY, Office of the Attorney General, Phoenix, AZ.

For Navajo Nation, Intervenor Defendant: Dana Lee Bobroff, LEAD ATTORNEY, Navajo Nation Department of Justice, Window Rock, AZ; Judith M Dworkin, Patricia Ferguson-Bohnee, LEAD ATTORNEYS, Sacks Tierney PA, Scottsdale, AZ.

For [*3] Leonard Gorman, Director, Intervenor: Dana Lee Bobroff, LEAD ATTORNEY, Navajo Nation Department of Justice, Window Rock, AZ; Judith M Dworkin, Patricia Ferguson-Bohnee, LEAD ATTORNEYS, Sacks Tierney PA, Scottsdale, AZ.

JUDGES: Roslyn O. Silver, Chief United States District Judge.

OPINION BY: Roslyn O. Silver

OPINION

ORDER

This action brought by voters challenges the 2012 redistricting of the Arizona legislature on the grounds that the districts--

> violate the one-person/one-vote requirement of the *equal protection clause of the Fourteenth Amendment to the United States Constitution*, and violate the equal population requirement of *Ariz. Const. art. 4, pt. 2, § 1(14)(B)*, by systematically overpopulating Republican plurality districts and systematically under-populating Democrat plurality districts with no lawful state interest justifying such deviations from equality of population among Arizona legislative districts.

First Amended Complaint ¶ 2 (Doc. 35). The principal pending motion is Defendants' Motion to Dismiss for failure to state a claim upon which relief can be granted and on other grounds (Doc. 40). Also pending are Defendants' Motion for Judicial Notice (Doc. 41), Plaintiffs' *Rule 56(d)* Motion (Doc. 46), and [*4] the Motion to Intervene by the Navajo Nation and Leonard Gorman (Doc. 27). The motions will be denied. The Navajo Nation may participate as an amicus curiae.

I. The Arizona Redistricting Process

By an initiative measure in the 2000 election, Arizona voters removed legislative and congressional redistricting from the legislature and entrusted them to an Independent Redistricting Commission under set processes with substantive standards. *See Ariz. Const. art. IV, pt. 2, § 1*. Four party members of the Commission are appointed, one each by the highest ranking majority and minority member of the Senate and the House of Representatives. They choose an independent fifth member from nominees made by another commission.

The Commission must follow a four-step process. *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n, 220 Ariz. 587, 597, 208 P.3d 676, 686 (2009)*. First, the Commission must create "districts of equal population in a grid-like pattern across the state." *Ariz. Const. art. IV, pt. 2, § 1(14)*. Second, the Commission must adjust the equally populated grid map "as necessary to accommodate" six goals enumerated in the Arizona Constitution to create a draft [*5] map. To do so, the Commission must begin by ensuring that the configuration of the districts complies with the United States Constitution and the Voting Rights Act. *Ariz. Const. art. IV, pt. 2, § 1(14)(A)*. Then the Commission must adjust the map to accomplish the remaining five goals "to the extent practicable": (1) equal population in congressional and legislative districts; (2) geographically compact and contiguous districts; (3) district boundaries that respect communities of interest; (4) district lines drawn using visible geographic features, city, town and county boundaries, and undivided census tracts; and (5) competitive districts, where such districts would create no significant detriment to the other factors. *Ariz. Const. art. IV, pt. 2, §§ 1(14)(B)-1(14)(F)*. Places of residence of incumbents or candidates may not be identified or considered. *Ariz. Const. art. IV, pt. 2, § 1(15)*.

Third, the Commission must advertise its adjusted draft map for at least 30 days and consider both public comments and any recommendations made by the Arizona legislature. *Ariz. Const. art. IV, pt. 2, § 1(16)*. Lastly, the Commission must establish final district boundaries and certify the new districts [*6] to the Arizona Secretary of State. Ariz. Const. art. IV, pt. 2, §§ 1(16)-1(17).

The Commission approved a map by a vote of three to two, the independent chair and the two Democratic Party appointees against the two Republican Party appointees. It has a maximum popu-

lation deviation of 8.8%. On April 26, 2012, the United States Department of Justice pre-cleared the plan under *Section 5 of the Voting Rights Act*, and Plaintiffs filed this action the next day.

II. Motion to Dismiss

Defendants, who are the Commission and its members, move to dismiss Plaintiffs' First Amended Complaint under *Federal Rule of Civil Procedure 12(b)(6)* and *Rule 8* for failure to state a claim upon which relief can be granted.

A. Legal Standard

To state a claim for relief under *Federal Rule of Civil Procedure 8(a)(2)*, a plaintiff must make "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. This "short and plain statement" must also be "plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

"Determining [*7] whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id. at 679*. A claim is plausible if it contains "[f]actual allegations [sufficient] to raise a right to relief above the speculative level," *Twombly, 550 U.S. at 555*, and to permit a reasonable inference that the defendant is liable for the conduct alleged. *Iqbal, 556 U.S. at 678*. A plaintiff's plausible factual allegations are taken as true, but legal conclusions or conclusory factual allegations are not. *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Rather, the plaintiff must at least "allege sufficient facts to state the elements of [the relevant] claim." *Johnson v. Riverside Healthcare Sys., LP, 534 F.3d 1116, 1122 (9th Cir. 2008)*.

B. Federal Equal Protection Claims for Population Deviation

Plaintiffs allege that the adopted legislative map violates the *Equal Protection Clause of the Fourteenth Amendment* by diluting the Plaintiffs' votes through unequal population distribution in legislative districts for an impermissible purpose. [*8] A challenge to state legislative apportionment under the *Equal Protection Clause* presents a justiciable controversy. *Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)*. The *Equal Protection Clause* requires that both houses of a state legislature "must be apportioned on a population basis." *Reynolds v. Sims, 377 U.S. 533, 577, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964)*. A state must "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Id.* But mathematical precision in legislative districts is not a workable constitutional requirement. In light of that practical concern, states may exercise some flexibility in constructing legislative districts. "So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible." *Id. at 579*. Any divergence from equality among districts must therefore result from "factors that are free from any taint of arbitrariness or discrimination." *Roman v. Sincock, 377 U.S. 695, 710, 84 S. Ct. 1449, 12 L. Ed. 2d 620 (1964)*.

A "maximum population deviation under 10%" does not, without [*9] more, make out a prima facie case under the *Equal Protection Clause*. *Brown v. Thomson, 462 U.S. 835, 842, 103 S. Ct. 2690, 77 L. Ed. 2d 214 (1983)*. There is a rebuttable presumption that a population deviation less than 10% was the result of an "honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Daly v. Hunt, 93 F.3d 1212, 1220 (4th Cir. 1996)* (quoting *Reynolds, 377 U.S. at 577*).

The result is a burden-shifting framework for population deviation claims under the *Equal Protection Clause*. If the maximum population deviation in a legislative apportionment plan is less than 10%, the burden shifts to the plaintiff to prove that the apportionment was arbitrary or discriminatory. *Daly, 93 F.3d at 1220*. To meet that burden, a plaintiff must show any deviation is "an arbitrary or discriminatory policy." *Larios v. Cox, 305 F. Supp. 2d 1335, 1339 (N.D. Ga. 2004)* (citing *Roman, 377 U.S. at 710*), *aff'd, 542 U.S. 947, 124 S. Ct. 2806,*

159 L. Ed. 2d 831 (2004). Further, the plaintiff must prove that "the asserted unconstitutional or irrational state policy is the *actual reason* for the deviation." *Rodriguez v. Pataki, 308 F. Supp. 2d 346, 365 (S.D.N.Y. 2004)* (quoting *Marylanders for Fair Representation v. Schaefer, 849 F. Supp. 1022, 1032 (D. Md. 1994))*.

Plaintiffs [*10] allege that the Commission systematically overpopulated Republican districts and under-populated Democratic districts for the sole purpose of maximizing Democratic Party strength in the state legislature. Their only federal challenge is that bare partisan political advantage is not a rational state policy justifying population deviation under the federal constitution and is a prohibited policy under Arizona law.

C. Discussion

On a motion to dismiss, the facts alleged must be taken as true unless conclusory or implausible. Plaintiffs have alleged data, details, context, and motivations arguably inferable from conduct. Regardless of what they can prove at trial, Plaintiffs have sufficiently alleged that the Commission added to some people's votes and diluted other people's votes based only on their expected party preference.

Under existing Supreme Court precedent, it is unclear whether pure partisanship is an arbitrary or discriminatory purpose and would therefore be an impermissible basis for population deviation. Likewise, it is unclear whether pure partisanship can be a legitimate state policy in the eyes of federal constitutional law if state law itself bars this purpose for population [*11] deviation. Both sides argue from the force of general principles, but neither side has Supreme Court authority on point. *See, e.g., Cox v. Larios, 542 U.S. 947, 949-50, 124 S. Ct. 2806, 159 L. Ed. 2d 831 (2004)* (Stevens, J, concurring in summary affirmance) ("[T]he equal-population principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its strength"); *id. at 951* (Scalia, J., dissenting from summary affirmance) ("No party here contends that . . . this Court has addressed the question" of whether a redistricting plan with less than 10% population deviation may be invalidated on the basis of evidence of partisan political motivation); *League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 423, 126 S. Ct. 2594, 165 L. Ed. 2d 609 (2006)* ("Even in addressing political motivation as a justification for an equal-population violation . . . *Larios* does not give clear guidance.").

The Arizona Constitution mandates equal population in the redistricting process, and that too may bear on the federal Equal Protection claim from population deviation. The Arizona Constitution requires the mapping process to begin with equal population, with adjustments to meet only six permitted goals, none of which clearly [*12] allows for partisan political advantage or proportional political influence. [1] One of the goals is equal population to the extent practicable. *Ariz. Const. art. IV, pt. 2, § 1(14)(B)*. At oral argument, all parties acknowledged that the question of whether *§ 1(14)(B)* is more stringent than the 10% burden-shifting standard under federal law has never been adjudicated. Language bearing on the issue in *Arizona Minority Coalition, 220 Ariz. 587, 208 P.3d 676*, is dictum. Whether any of these issues matter will turn on the actual facts proven at trial.

1 The final goal under the Arizona constitution is the creation of "competitive districts." *Ariz. Const. art. IV, pt. 2, § 1(14)(F)*. The parties have not addressed what "competitive" means in this context and whether that goal requires the Commission to assess partisan consideration.

In light of the foregoing, we cannot say to a certainty that Plaintiffs have stated no federal Equal Protection claim upon which relief can be granted. Nor can we now say to a certainty that the Arizona equal population claim fails as a matter of law, whether on its own or in connection with the federal claim. We must therefore deny the Motion to Dismiss without prejudice [*13] and leave the issue and the case to be decided after trial and full briefing.

D. Other Pleading Challenges

The Commission contends that the First Amended Complaint exceeds the "short and plain statement of the claim showing the pleader is entitled to relief" required by *Federal Rule of Civil Procedure 8(a)(2)* and that the allegations are not "simple, concise, and direct" as required by *Rule 8(d)(1)*. Some allegations are said to be irrelevant,

immaterial, impertinent, inflammatory, or scandalous. The Complaint may be adjectivally aggressive in places, but the challenged substance is permissible pleading under *Twombly* and *Iqbal*. It alleges a pattern of actions from which one might plausibly infer the actual and sole purpose of the Commission in ultimately effecting the population deviation it adopted. Parties are permitted to try to plead "[f]actual allegations [sufficient] to raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555*. They need not and may not rely on bare conclusory allegations alone.

III. Motion for Judicial Notice

The Commission's Motion for Judicial Notice (Doc. 41) of selected portions of the record of Commission meetings is misplaced; but even [*14] if granted it would not make a difference in deciding the Motion to Dismiss. The Commission offers selected portions of the record of Commission meetings to establish conclusively that it had legitimate bases for its redistricting decisions--and to bar any pleading to the contrary. But the selections the Commission offers may be materially incomplete. Moreover, that things were said by or before the Commission does not make them necessarily true. Judicial notice is permitted only if the fact is generally known or capable of accurate and ready determination by resort to "sources whose accuracy cannot reasonably be questioned." *Fed. R. Evid. 201(b)*. If the statements were judicially noticed, it would prove only that statements were made, not that they are true or reflect the Commission's actual purpose. Defendants' Motion for Judicial Notice (Doc. 41) will be denied.

Plaintiffs' *Rule 56(d)* Motion (Doc. 46) for a continuance to obtain additional evidence will be denied as moot, as the Court has not converted the Motion to Dismiss to a motion for summary judgment under *Federal Rule of Civil Procedure 56* and *12(d)* or granted Defendants' Motion for Judicial Notice (Doc. 41).

IV. Motion to Intervene [*15] **by the Navajo Nation**

The Motion to Intervene by the Navajo Nation and Leonard Gorman (Doc. 27) will be denied for failure to show that disposition of this action may, as a practical matter, impair or impede their ability to protect their interest in this action and because their interest is adequately represented by the Commission. The Arizona portion of the Navajo Reservation lies within Legislative District 7 ("LD7"), the most under-populated district in the adopted plan and the sole majority-minority Native American legislative district. The Navajo Nation was an active participant in the Arizona redistricting process and coordinated its efforts through Mr. Gorman, Director of the Navajo Human Rights Commission.

A. Intervention as a Matter of Right

To intervene as a matter of right a party must establish that: (1) the motion is timely; (2) the intervenor possesses a significant interest in the subject matter of the action; (3) the intervenor is so situated that the disposition of the action may, as a practical matter, impair or impede its ability to protect its interests; and (4) the interests of the intervenor may not be adequately represented by existing parties. *Citizens for Balanced Use v. Mont. Wilderness Ass'n, 647 F.3d 893, 897 (9th Cir. 2011)*. [*16] "Failure to satisfy any one of the requirements is fatal to the application." *Perry v. Proposition 8 Official Proponents, 587 F.3d 947, 950 (9th Cir. 2011)*. Each of the requirements must be interpreted broadly in favor of intervention, *Prete v. Bradbury, 438 F.3d 949, 954 (9th Cir. 2006)*, and "our review is guided primarily by practical considerations, not technical distinctions." *Mont. Wilderness, 647 F.3d at 897* (quoting *Sw. Ctr. for Biological Diversity v. Berg, 268 F.3d 810, 818 (9th Cir.2001))*.

The Navajo Nation's Motion is timely. The Nation has an interest in maintaining a majority-minority Native American district. Generously read, its interest "is protectable under some law and . . . there is a relationship between the legally protected interest and the claims at issue." *Id. at 897*. However, the Nation cannot plausibly show that its interest would be impaired absent intervention--that it would "be substantially affected in a practical sense by the determination made in an action." *Id.* (quoting *Fed. R. Civ. P. 24* advisory committee's note). Eliminating the under-population in LD7 could not change the overwhelming majority-minority Native American character of LD7.

In the prior [*17] redistricting plan there was one Native American majority-minority legislative district (the "benchmark district") with Native American population of 63.7% and Native American voting age population of 59.6%. In the new LD7, Native American population is 66.9%. (Doc. 27 at 7.) There is an insignificant discrepancy in the record as to whether LD7 has a Native American voting age population of 63.1% (Doc. 44 at 6) or 63.7% (Doc. 27 at 7), which does not affect the analysis. Further, there was an immaterial difference in Native American voting age population between the Commission's draft legislative map and the adopted final map, which increased from 61.9% to either 63.1% or 63.7%. (Doc. 44 at 6.) Both the draft map and the final map thus increased the Native American voting age population over the benchmark district. Even if the LD7 Native American voting age population returned to that of the equal population draft map, it would not retrogress from the prior benchmark district. There is no plausible outcome of this action that would impair the interest upon which the Navajo Nation and Mr. Gorman predicate their intervention--avoidance of retrogression and maintenance of a majority-minority [*18] Native American district.

Of course, if Plaintiffs prevail in this action and the Commission is ordered to revise the plan to reduce the population deviation, the Nation can participate in further proceedings before the Commission on all matters, not just population deviation, on an equal footing with all others. But the Nation's interest in all matters does not entitle it to intervene here, any more than those matters would entitle everyone who participated in the Commission proceedings to intervene in this action.

The Navajo Nation has not met its burden to show that its ability to protect its interests would be impaired by the disposition of this case.

The Navajo Nation also fails to show that the Commission may not adequately represent the Nation's interest. "The burden of showing inadequacy of representation is 'minimal' and satisfied if the applicant can demonstrate that representation of its interests 'may be' inadequate." *Mont. Wilderness, 647 F.3d at 898* (quoting *Arakaki v. Cayetano, 324 F.3d 1078, 1086 (9th Cir. 2003)*). Adequacy of representation considers: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; [*19] (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Arakaki, 324 F.3d at 1086*. Because the Navajo Nation and the Commission "share the same ultimate objective" of upholding the Commission's final legislative map, "a presumption of adequacy of representation arises." *Mont. Wilderness, 647 F.3d at 898* (citing *League of United Latin Am. Citizens v. Wilson, 131 F.3d 1297, 1305 (9th Cir. 1997)*). "To rebut the presumption, an applicant must make a 'compelling showing' of inadequacy of representation." *Id.* (quoting *Arakaki, 324 F.3d at 1086*).

The Commission's interest in defending the entire plan does not weaken its shared interest with the Nation in defending LD7. The Nation has not shown that it would offer anything that the Commission would neglect. Further, the adequacy of the Commission's representation of the Nation's interest is not an abstraction. The Court invited the Navajo Nation to file a proposed motion to dismiss that was "focused on matters affecting their purported separate interest" and made clear that "repetitive briefing or [*20] other repetitive presentation would not be helpful to the Court." (Doc. 38 at 2.) Despite this warning, the Navajo Nation's proposed brief is largely repetitive of the Commission's Motion to Dismiss.

B. Permissive Intervention

In its discretion, the Court may permit a party to intervene who "has a claim or defense that shares with the main action a common question of law or fact." *Fed. R. Civ. P. 24(b)(1)(B)*. The decision is discretionary and "subject to considerations of equity and judicial economy." *Garza v. Cnty. of Los Angeles, 918 F.2d 763, 777 (9th Cir. 1990)*. One consideration is whether intervention will unduly delay the proceedings or prejudice the adjudication of the original parties' rights. *Fed. R. Civ. P. 24(b)(3)*.

An intervenor has most of the rights of a party, including presentation of its own motions and evidence. Time is critical in this action, as it must be concluded with relief implemented or denied, and appellate review taken, without disrupting the 2014

elections. Six months have already passed, and the pleadings are not even closed. A trial must be had by March and a prompt ruling thereafter. An unnecessary party adds complexity and risk of delay without countervailing [*21] benefit. Therefore, permissive intervention will be denied. The Motion to Intervene by the Navajo Nation and Leonard Gorman (Doc. 27) will be denied.

The benefit of the Navajo Nation's voice can be had by amicus curiae participation, without complicating the expeditious processing of the case. Therefore, the Navajo Nation will be granted leave to file a brief as amicus curiae at the same time as the Commission's principal brief is filed.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss (Doc. 40) is DENIED.

IT IS FURTHER ORDERED that Defendants' Motion for Judicial Notice (Doc. 41) is DENIED.

IT IS FURTHER ORDERED that Plaintiffs' *Rule 56(d)* Motion (Doc. 46) is DENIED as moot.

IT IS FURTHER ORDERED that the Motion to Intervene by the Navajo Nation and Leonard Gorman (Doc. 27) is DENIED.

IT IS FURTHER ORDERED that the Navajo Nation is granted leave to participate as amicus curiae and may file a brief at the same time as the Commission's principal brief is filed.

IT IS FURTHER ORDERED that Plaintiffs are granted leave to amend their complaint by November 16, 2012, solely to amend their allegations concerning legislative district 8.

Dated this 16th day of November, 2012.

/s/ Roslyn O. [*22] Silver

Roslyn O. Silver

Chief United States District Judge